

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WILLIAM SIDEL AND DEBRA SIDEL	:	DETERMINATION
D/B/A HALF & HALF TRADING CO.	:	
	:	
for Revision of Determinations or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1984	:	
through February 28, 1986.	:	

Petitioners, William Sidel and Debra Sidel d/b/a Half & Half Trading Co., 82 Parkside Court, Buffalo, New York 14214, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1984 through February 28, 1986 (File No. 806475).

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 462 Washington Street, Buffalo, New York, on March 6, 1990 at 9:15 A.M. Petitioners appeared by Daniel J. Scully, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether, as a result of a field audit, the Division of Taxation properly determined additional tax due.

II. Whether petitioners have shown reasonable cause and an absence of willful neglect for abatement of penalties imposed herein.

FINDINGS OF FACT

On November 20, 1987, following an audit, the Division of Taxation issued to petitioner William Sidel d/b/a Half & Half Trading Co. a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which assessed \$5,860.85 in tax due, plus penalty and interest, for the period March 1, 1984 through February 28, 1986.

Also on November 20, 1987, the Division issued a notice of determination to petitioner Debra Sidel d/b/a Half & Half Trading Co. which assessed identical amounts of tax, penalty and interest as that issued to William Sidel.

Half & Half Trading Co. was a sole proprietorship engaged in the retail sale of women's clothing. Half & Half Trading Co. had two retail stores in the Buffalo area during the audit period. Prior to 1986, the business was run on a day-to-day basis by petitioner William Sidel. During that time, Mr. Sidel was assisted by petitioner Debra Sidel who aided Mr. Sidel in purchasing merchandise and paying bills. Beginning in 1986, William Sidel was no longer involved in the business and Debra Sidel became the sole proprietor.

Federal schedule C's for the years 1984 and 1985 filed in respect of Half & Half Trading Co. listed Debra Sidel as the proprietor of the business.

The assessments herein consist of two components: \$5,503.08 in tax due on additional retail sales and \$357.77 in tax due arising from certain asset acquisitions. Petitioners did not offer evidence to refute the asset acquisitions component of the assessment.

On audit of petitioners' retail sales, the Division reviewed monthly sales summaries which had been prepared by petitioners' bookkeeper from information contained in petitioners' general ledger. The Division concluded that such summaries were inadequate as they did not tie into either gross receipts as reported on petitioners' schedule C's or gross sales as reported on petitioners' sales tax returns. The Division therefore requested petitioners' sales invoices and cash register tapes for the audit period. Such invoices and cash register tapes were not provided.

As a result of the foregoing, the Division determined petitioners' additional taxable sales by calculating the difference between gross receipts as reported on Federal schedule C's and gross sales as reported on sales tax returns.¹ This difference was determined to be additional taxable sales.

¹For each of the sales tax periods at issue, petitioners' sales tax returns reported no nontaxable sales (i.e., reported gross and taxable sales figures were identical).

For 1984, petitioners' schedule C listed \$418,426.00 in gross receipts, while petitioners' sales tax returns reported \$358,549.00 in gross sales for this same period.² The Division thus determined \$59,877.00 in additional taxable sales for this same period. The Division then allocated this additional taxable sales figure to sales tax periods based upon the ratio of gross sales reported per quarter (i.e. periods ended 2/84, 5/84, 8/84 and 11/84) to gross sales reported over the 12-month period December 1, 1983 through November 30, 1984.³

For 1985, the schedule C filed in respect of Half & Half Trading Co. reported gross receipts of \$294,174.00. Petitioners' gross sales per sales tax returns for this same period were \$274,715.00. The Division determined this difference of \$19,459.00 to be additional taxable sales and allocated this amount to the four sales tax periods ended February 28, 1985 through November 30, 1985 based upon the ratio of gross sales reported per quarter to the total of gross sales reported over the same 12-month period.

For the period ended February 28, 1986, the Division determined additional tax due by applying an error rate of .11742 to the sales tax reported for this period. This resulted in additional tax due for this quarter of \$643.81. The error rate was determined by dividing additional tax determined to be due on audit for the period March 1, 1984 through November 30, 1985 (\$4,859.27) by sales tax reported for the same period (\$41,383.00).

Petitioners' Federal income tax returns were prepared by a certified public accounting firm.

²1984 calendar year gross sales figures, based upon gross sales as reported on sales tax returns, were determined by calculating the sum of two-thirds of the gross sales reported for the period ended February 29, 1984, the gross sales reported for the periods ended May 31, 1984, August 31, 1984 and November 30, 1984, and one-third of the gross sales reported for the period ended February 28, 1985. The same apportioning method was used to determine gross sales for 1985.

³The Division did not assess tax on the additional sales determined for the period ended February 28, 1984, as it concluded that this period was beyond the relevant period of limitations for assessment.

Petitioners' sales tax returns were prepared by their bookkeeper. Petitioners signed and filed the sales tax returns.

CONCLUSIONS OF LAW

A. The Division's use of an indirect audit method is proper where, as here, a taxpayer does not have the records necessary to verify taxable sales (Matter of Licata v. Chu, 64 NY2d 873, 487 NYS2d 552). Under such circumstances, the Division has a duty to determine tax due from such information as may be available (Tax Law § 1138[a][1]). The Division is required to select an audit method reasonably calculated to reflect the tax due (Matter of Grant Co. v. Joseph, 2 NY2d 196, 204, 159 NYS2d 150, 157 cert denied 355 US 869). Where the Division selects such an audit method, a presumption of correctness attaches to the assessment (Matter of Cousins Service Station, Tax Appeals Tribunal, August 11, 1988) and petitioner bears the burden of proving error (Matter of Scarpulla v. State Tax Commn., 120 AD2d 842, 502 NYS2d 113).

B. Petitioners have failed to prove error in either the audit method or result. With respect to the methodology, it was manifestly reasonable to assess tax based upon reported gross receipts for Federal income tax purposes, for Tax Law § 1132(c) presumes the taxability of all receipts. Moreover, the sales tax returns filed on behalf of Half & Half Trading Co. indicated that 100% of its sales were taxable.

C. Petitioners' attack on the audit result centered upon their contention that the amounts set forth as gross receipts on their 1984 and 1985 schedule C's were overstated. Specifically, petitioners contended that such reported gross receipts included certain layaway sales which were ultimately refunded to customers. In support of their contention, petitioners introduced monthly summaries purporting to show total taxable sales, layaway sales, monies received on layaway accounts, and refunds.

Petitioners' evidence is unconvincing. First, contrary to petitioners' assertion, the monthly summaries do not appear to corroborate either the sales tax returns or the schedule C's. The monthly summaries show total taxable sales of about \$379,812.00 for 1984. In contrast,

petitioners' 1984 schedule C reports \$418,426.00 in gross receipts and petitioners' sales tax returns encompassing 1984 total \$358,549.00. Based upon this evidence, it must be concluded that the monthly summaries themselves are unreliable. Second, petitioners' position presumes a consistent overreporting of gross receipts for Federal income tax purposes. Moreover, such overreporting purportedly occurred notwithstanding the ready availability of the purportedly accurate sales tax returns. Additionally, petitioners apparently never sought a refund of the Federal income taxes they purportedly overpaid. The record is thus insufficient to conclude, first, that petitioners consistently overreported gross receipts on their schedule C's, and second, that petitioners' Federal income tax returns were inaccurate. Finally, petitioners introduced no documentary evidence (e.g. receipts, invoices) of any specific layaway sales or refunds. Petitioners' contentions thus rest upon testimony and the monthly summaries. Such evidence is insufficient for petitioners to meet their burden herein.

D. As to the issue of penalty, petitioners contended that their failure herein resulted from their reliance upon their bookkeeper, who prepared the monthly summaries and the sales tax returns. Based upon the record, it does not appear that such reliance constitutes reasonable cause for petitioners' failure within the meaning of Tax Law § 1145(a)(1)(iii) and 20 NYCRR 536.5. Moreover, petitioners themselves clearly failed to maintain records sufficient to verify all transactions in a manner suitable to determine the correct amount of tax due as required by Tax Law § 1135(a). The Division's assertion of penalty was therefore proper.

E. The petition of William Sidel and Debra Sidel d/b/a Half & Half Trading Co. is denied and the notices of determination and demands for payment of sales and use taxes due, dated November 20, 1987, are sustained.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE